IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS

CRYSTAL MASON, *APPELLANT*	§	
V.	§	NO. 02-18-00138-CR
THE STATE OF TEXAS, *APPELLEE*	§	

APPEALED FROM CAUSE NUMBER 1485710D IN THE 432ND DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE RUBEN GONZALEZ, JR., PRESIDING

STATE'S BRIEF

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

JOSEPH W. SPENCE
Assistant Criminal District Attorney
Chief, Post-Conviction

HELENA F. FAULKNER
Assistant Criminal District Attorney
State Bar No. 06855600
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-1685
FAX (817) 884-1672
coaappellatealerts@tarrantcountytx.gov

MATT SMID and
JOHN NEWBERN
Assistant Criminal District Attorneys

The State requests oral argument only if Appellant is granted argument

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TO THE HONORABLE COURT OF APPEALS:

Statement of the Case

The Charge ..... Illegal Voting
CR 1: 7

The Plea ..... Not Guilty
CR 1: 33; RR 2: 8

The Verdict (Court) ..... Guilty
CR 1: 33; RR 2: 169

The Punishment (Court) ..... Five Years' Confinement
CR 1: 33; RR 2: 177-78

Statement of Facts

Appellant's Prior Federal Conviction

On November 23, 2011, Appellant plead guilty in federal district court to the offense of conspiracy to defraud the United States. RR 2: 17-18, 108; RR 3: S-X 1. On March 16, 2012, the court sentenced her to a sixty-month term of confinement in federal prison, followed by three years on supervised release, and ordered her to pay $4,206,085.49 in restitution. RR 2: 17-18, 108; RR 3: S-X 1.

On August 5, 2016, Appellant was released from prison, met with her probation officer, and began her three-year period of supervised release. RR 2: 18-20. Appellant understood her supervision conditions. RR 2: 19-20. Thereafter, Appellant attended scheduled meetings with her probation officer. RR 2: 20.

Cancellation of Appellant's Voter Registration

On May 22, 2013, after receiving notice of Appellant's federal felony conviction, the Tarrant County Elections Administration mailed a Notice of Examination to Appellant's home address. RR 2: 30-33, 45; RR 3: S-X 6. The notice informed Appellant that her registration status was being examined due to her felony conviction and gave her thirty days to establish her qualifications to remain registered. RR 2: 32; RR 3: S-X 6. Appellant failed to respond. RR 3: S-X 6. On June 25, 2013, the Elections Administration notified Appellant that her voter

registration in Tarrant County had been cancelled. RR 2: 31, 33-34, 47; RR 3: S-X 6.

Appellant Votes in the 2016 General Election

After work on November 8, 2016, Appellant picked up her niece Joanna Jones to go vote in the general election. RR 2: 116. Jones was in the wrong precinct, so she returned to the car to wait for Appellant. RR 2: 118-19. Meanwhile, neither poll clerk Jarrod Streibich nor election judge Karl Dietrich could find Appellant's name in the book of registered voters. RR 2: 59-60, 99, 119, 131. Appellant told Dietrich that she knew of no reason that she would not be on the registered voters' list, that someone in her household had voted earlier in the day, and that she obviously should be allowed to vote. RR 2: 60. Dietrich then searched the online voter database, but he still was unable to identify Appellant as a registered voter. RR 2: 60.

Dietrich could not allow Appellant to vote normally because she was not listed as a registered voter. RR 2: 62. He asked if she wanted to vote provisionally, and she responded affirmatively.[1] RR 2: 62. Appellant and Dietrich then sat at a table away from the voting line and booths to read the information on the provisional envelope. RR 2: 67, 73, 100-02. Appellant filled out the envelope's white section and signed the Affidavit of Provisional Voter, which stated the requirements for eligibility to

[1] At the time, Dietrich, who happened to be Appellant's neighbor, did not know that Appellant was a convicted felon or that she was on supervised release. RR 2: 54-56, 91-92, 94.

vote. RR 2: 44, 47, 50, 65-66, 68-71; RR 3: S-X 8, 9. The affidavit included the following admonishments: "I . . . have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned. . . . I understand that it is a felony of the 2nd degree to vote in an election for which I know I am not eligible." RR 3: S-X 8, 9. Both Dietrich and Streibich believed that Appellant read the provisional ballot envelope. RR 2: 71, 75-76, 85-86, 89, 102. When Dietrich raised his right hand and asked if Appellant affirmed that the information was accurate, Appellant responded affirmatively. RR 2: 71-72. Dietrich would not have let Appellant affirm to the affidavit if she appeared not to have read it. RR 2: 74. Appellant then returned to Streibich, placed her name on the provisional sign-in sheet, and voted. RR 2: 74-75, 102-03; RR 3: S-X 7.

When the polls closed, the provisional ballots were placed in a special bag and submitted with all other ballots to the tally station where ballots across the county were collected. RR 2: 77-78. On December 1, 2016, the Elections Administration notified Appellant that her provisional ballot was rejected and not counted because she either was not a registered voter or her registration was not effective in time for the election. RR 2: 38; RR 3: S-X 6.

Motions for New Trial and Hearing

On April 25, 2018, Appellant timely filed a motion for new trial alleging that: (a) evidence of bias was not explored; (b) evidence of her knowledge and intent was not investigated or presented to the trial court; and (c) the evidence is legally insufficient to establish the elements of voting and ineligibility to vote. CR 1: 42-45, 197. The thirty-day deadline to amend the motion for new trial was April 27, 2018.[2] CR 1: 197.

On May 10, 2018, Appellant presented a motion for leave to amend her motion for new trial and a proposed order to the Hon. George Gallagher, presiding judge of the 396th District Court.[3] CR 1: 59-60, 198. Neither the trial judge in the convicting court nor the State was aware that Appellant had approached Judge Gallagher. CR 1: 198; Suppl. RR 2: 7-8.[4] Nevertheless, Judge Gallagher signed the order granting Appellant leave to amend her motion for new trial. CR 1: 60, 198. Appellant then filed an amended motion for new trial alleging that: (a) her trial counsel provided ineffective assistance because he did not move to quash the indictment, explore Dietrich's bias, and present evidence of her lack of knowledge

[2] *See* TEX. R. APP. P. 21.4(a) & (b) (defendant must file motion for new trial and any subsequent amendments within 30 days after date trial court imposes or suspends sentence in open court).

[3] Judge Gallagher had no previous involvement in this case.

[4] "Suppl. RR 2" filed with this Court as part of the appellate record is identical to the "Motion for New Trial RR 1" cited in the trial court's written findings of fact and conclusions of law, and "RR 2" filed with this Court is identical to "Trial RR 2" cited in the lower court's findings.

and intent; (b) the evidence is legally insufficient to prove the elements of voting and ineligibility to vote; and (c) section 11.002(a)(4) of the Texas Election Code is unconstitutionally vague. CR 1: 61-68, 197-98. On May 17, 2018, the State filed a motion to set aside the order signed by Judge Gallagher and objected to the trial court considering Appellant's untimely amended motion for new trial because it was filed outside the deadlines provided by rule 21.4 of the Texas Rules of Appellate Procedure. CR 1: 98-99, 199.

On May 25, 2018, the trial court held a hearing on the State's motion to set aside the order signed by Judge Gallagher, Appellant's amended motion for new trial, and Appellant's motion for new trial. CR 1: 101, 199; Suppl. RR 2: 5-67. Appellant acknowledged that the trial court could not consider her untimely amended motion for new trial over the State's objection. CR 1: 199; Suppl. RR 2: 9-10. Appellant withdrew her amended motion for new trial. CR 1: 199; Suppl. RR 2: 9-10. The trial court then: (1) granted the State's motion to set aside the order for leave to file an amended motion for new trial signed by Judge Gallagher on May 10, 2018; (2) found that it could not, and would not, consider Appellant's amended motion for new trial that was untimely filed on May 10, 2018; and (3) heard Appellant's motion for new trial that was timely filed on April 25, 2018. CR 1: 199-200; Suppl. RR 2: 10-11.

Appellant called only one witness – her trial counsel in the case at bar, Warren St. John – to testify at the motion-for-new-trial hearing. RR 2: 15-47. St. John testified as follows:

- St. John represented Appellant in her federal fraud case that formed the basis of the State's illegal voting allegations in the present prosecution. Suppl. RR 2: 17.

- While Appellant was on pretrial release in her federal case, St. John told her that she would not have the right to vote after her felony conviction. Suppl. RR 2: 21-22, 25, 27.

- The fact that St. John told Appellant during her federal case that she would not be able to vote did not create a conflict of interest that prevented him from representing Appellant in her state trial for illegal voting. Suppl. RR 2: 33. Appellant did not remember St. John telling her that she could not vote, and the fact that he told her that she could not vote had nothing to do with her defense. Suppl. RR 2: 34-35.

- Appellant's mother and niece were not necessary witnesses at trial because Appellant testified that she believed she could vote and that her mother encouraged her to vote. Suppl. RR 2: 21.

- St. John knew of no legal reason to seek to recuse the trial judge when he disclosed during trial that he knew Dietrich from a political gathering, but had never discussed Appellant's case with him. Suppl. RR 2: 30. St. John knows the trial judge to be "a man with integrity" and "a fair judge," and St. John believed that Appellant received a fair trial. Suppl. RR 2: 31.

- St. John did not ask for a directed verdict because this was not a jury trial. Suppl. RR 2: 35.

- St. John did not move to quash the indictment because it tracked the applicable statute. Suppl. RR 2: 35.

- St. John believed that Appellant was ineligible to vote under Texas statute because she was a convicted felon on federal supervised release. Suppl. RR 2: 37, 46-47.

- The State explored Dietrich's bias that was alleged in Appellant's motion for new trial. Suppl. RR 2: 42. Dietrich testified that he and Appellant were neighbors, and the State asked if Dietrich knew that Appellant was a felon when she went to the poll to vote. Suppl. RR 2: 43.

Summary of the State's Reply

Reply to points of error one and two

The evidence viewed in the light most favorable to the trial court's finding of guilt is sufficient to allow the court to rationally find beyond a reasonable doubt that Appellant was ineligible to vote, that she voted, and that she knew she was ineligible to vote. Therefore, the evidence is sufficient to sustain Appellant's conviction for illegal voting.

Reply to point of error three

This Court cannot consider Appellant's constitutional challenge to section 11.002(a)(4) of the Texas Election Code because it was raised in Appellant's untimely amended motion for new trial and the State objected to the trial court considering it. Alternatively, because Appellant withdrew her amended motion for new trial, Appellant never presented her complaint to the trial court, and the trial court never ruled on it; hence, nothing was preserved for review on appeal.

Reply to point of error four

The trial court properly refused to consider arguments raised only in the *amicus* letter brief. The brief addressed no issues that the trial court had authority to consider. Moreover, the brief addressed arguments that Appellant never raised in the trial court, and no exceptional circumstances existed to consider it.

Reply to point of error five

This Court cannot consider Appellant's allegations of ineffective assistance made in her untimely amended motion for new trial. Alternatively, Appellant's complaints raised only in her withdrawn amended motion for new trial present nothing for this Court's review on appeal. Finally, Appellant failed to meet her burden to establish her ineffective-assistance claims raised in her timely motion for new trial.

Reply to Points of Error One and Two

Appellant's Contention

The evidence is legally and factually insufficient to support a conviction of illegal voting.

State's Reply

The evidence viewed in the light most favorable to the trial court's finding of guilt is sufficient to allow the court to rationally find beyond a reasonable doubt that Appellant was ineligible to vote, that she voted, and that she knew she was ineligible to vote. Therefore, the evidence is sufficient to sustain Appellant's conviction for illegal voting.

Argument and Authorities

I. Standard of Review

The same standard of legal-sufficiency review applies to jury and bench trials. *See Robinson v. State*, 466 S.W.3d 166, 172 (Tex. Crim. App. 2015). In reviewing the sufficiency of the evidence to support a conviction, the appellate court views the evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the offense beyond a

reasonable doubt.[5] *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Robinson*, 466 S.W.3d at 172. This standard accounts for the factfinder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. The reviewing court may not reevaluate the weight and credibility of the record evidence and thereby substitute its judgment for that of the factfinder. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

The same standard of review applies to both direct and circumstantial evidence cases. *Id*. Circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence along may be sufficient to establish guilt. *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013).

II. The Evidence Is Sufficient to Prove the Offense of Illegal Voting

A person commits the offense of illegal voting if she votes in an election in which she knows she is not eligible to vote. TEX. ELEC. CODE § 64.012(a)(1). A person is qualified to vote if, in relevant part, she has not been finally convicted of a

[5] Appellant alleges in point of error two that the evidence is factually insufficient to sustain her conviction. The Court of Criminal Appeals laid to rest the factual-sufficiency standard of review in *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). This Court should decline Appellant's invitation to conduct a factual-sufficiency review and should review the evidence only under the *Jackson* legal-sufficiency standard. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Brooks*, 323 S.W.3d at 912. Appellant's second point of error should be summarily overruled.

felony or, if so convicted, has "fully discharged [her] sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court." TEX. ELEC. CODE § 11.002(a)(4)(A).

A. The Evidence Is Sufficient to Prove Appellant's Ineligibility to Vote

Appellant testified at trial that she is a convicted felon. RR 2: 108. She plead guilty on November 23, 2011, to the federal felony offense of conspiracy to defraud the United States. RR 2: 17-18; RR 3: S-X 1. She was on supervised release when she voted in the general election on November 8, 2016, and she remained on supervised release at the time of her trial in this case. RR 2: 20-21. Appellant was supervised by a federal probation officer and was well aware that she was on supervised release for her federal felony conviction. RR 2: 15, 19-20, 110. On cross-examination at trial, Appellant agreed that the Affidavit of Provisional Voter that she completed and executed on November 8, 2016, makes it clear that a felon who is on supervised release is not eligible to vote and that it is a second-degree felony to vote in an election in which a person knows she is not eligible. RR 2: 144-45, 150-51. She claimed that, had she read the affidavit, she would not have voted.[6] RR 2: 160.

[6] Dietrich and Streibich testified that they believed Appellant read the affidavit. RR 2: 71, 75-76, 85-86, 89, 102.

Appellant's defensive strategy at the guilt-innocence phase of the trial was that she did not read the admonishments in the Affidavit of Provisional Voter, that the government never told her that she could not vote as a convicted felon, and that she would not have voted had she known she was ineligible. *See, e.g.*, RR 2: 12-14, 112-68, 161-64. She never asserted that she was actually eligible to vote in the November 8, 2016, general election.

Appellant argues that "supervision" as included in section 11.002(a)(4)(A) of the Texas Election Code addresses only state sentencing and that federal supervised release "likely does not constitute supervision as that term is used in Texas law." Appellant's Brief at 4-8. Appellant's unduly narrow interpretation of "supervision" as being synonymous with "community supervision" in Texas is not supported by the statute's express language. *See* TEX. ELEC. CODE § 11.002(a)(4)(A). The Texas Legislature chose the more expansive term "supervision" rather than the narrower term of art "community supervision." *Id*. It is undisputed that Appellant remained on a term of supervision for her federal felony conviction when she voted on November 8, 2016. RR 2: 20-21. There is no reason to believe that the Legislature intended the term "supervision" to apply only to persons serving community supervision for a Texas case and not to apply to persons under some form of supervision for a conviction in another state or in federal court. Appellant's interpretation of "supervision" leads to the absurd result of disqualifying persons

convicted in Texas state courts who remain on community supervision from voting while sweeping similarly situated persons convicted in federal or other states' courts into the definition of qualified voter.

Appellant states without citation to authority that her "only interaction with the authority overseeing her was the requirement that she log into the Federal website once monthly and certify that she had not moved, and update any changed information." Appellant's Brief at 6. Kenneth Mays supervised one of the officers who supervised Appellant's release. RR 2: 15, 22. During Appellant's supervised release, Mays met Appellant personally, and he had occasions to speak to her in the office and in her home. RR 2: 15, 19. Mays and Appellant had many conversations about her specific conditions of supervision. RR 2: 20. This evidence certainly contradicts Appellant's characterization of her supervised release in her brief on appeal. *See* Appellant's Brief at 6. Moreover, even if Appellant's characterization of her supervision were correct, she nevertheless was on supervised release as a result of her federal felony conviction when she voted, which rendered her, by her own admission at trial, ineligible to vote. RR 2: 20-21, 144-45, 150-51.

After viewing the evidence in the light most favorable to Appellant's conviction, this Court should conclude that the trial court could rationally find beyond a reasonable doubt that Appellant, a convicted felon who remained on supervised release, was not eligible to vote when she cast her electronic ballot in the

general election on November 8, 2016. *See* TEX. ELEC. CODE §§ 11.001 (defining eligibility to vote), 11.002 (defining qualified voter). Accordingly, Appellant's first point of error should be overruled insofar as she challenges the sufficiency of the evidence to prove her ineligibility to vote.

B. The Evidence Is Sufficient to Prove Appellant Voted

Appellant was found guilty of voting in an election in which she knew she was not eligible to vote. CR 1: 7; *see* TEX. ELEC. CODE § 64.012(a)(1). She argues that her rejected provisional ballot was not a vote, but was "an application which was denied." Appellant's Brief at 8.

The Texas Election Code does not define "vote." In determining the plain meaning of a statute, courts read words and phrases in context and construe them according to the rules of grammar and common usage. *Prichard v. State*, 533 S.W.3d 315, 319 (Tex. Crim. App. 2017). The reviewing court may consult dictionaries to determine an undefined term's plain meaning. *Id*. at 319-20. Black's Law Dictionary defines "vote" as "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." BLACK'S LAW DICT. (10th ed. 2014).

On November 8, 2016, Appellant appeared at the poll, filled out an Affidavit of Provisional Voter listing the requirements for eligibility to vote, and affirmed that the information in the affidavit was accurate. RR 2: 59, 64-68, 71, 114, 117; RR 3:

S-X 9. She then submitted her vote electronically. RR 2: 64, 74-75, 103, 152. Dietrich responded affirmatively when asked, "Now, after she affirmed to the language in the affidavit, did she, in fact, vote?" RR 2: 74-75. Similarly, Streibich responded affirmatively when asked, "Did she then cast a ballot?" RR 2: 103.

Kenisha King, assistant voter registration manager for Tarrant County, testified that no voter is turned away from voting at the polling location. RR 2: 42. A person whose name is not on the list of registered voters is offered a provisional ballot, and the Election Administration determines later whether the ballot will count. RR 2: 42, 48. Even if the vote does not end up counting, the end effect of the Affidavit of Provisional Voter is to allow the election judge at the polling location to issue a provisional ballot to allow the voter to vote on the electronic machine. RR 2: 42.

Election judge Dietrich explained that a provisional voter casts her vote provisionally on an electronic voting machine. RR 2: 64, 81. He gave Appellant a PIN that allowed her to go into a voting booth and to vote for the candidates on the ballot in that precinct. RR 2: 81, 87. Appellant was then entered into the list of provisional voters in the book of registered voters, and she signed the book. RR 2: 64, 102-03; RR 3: S-X 7. All of the provisional envelopes were placed in a special bag and submitted to the tally station where all of other ballots from across the county were collected. RR 2: 77-78.

Nothing in the express language of section 64.012(a)(1) required the State to prove that Appellant's vote was included in the final voter tally. *See* TEX. ELEC. CODE § 64.012(a)(1); *see also Lebo v. State*, 90 S.W.3d 324 (Tex. Crim. App. 2002) (statutory interpretation begins with statute's plain language). Appellant voted when she expressed her preference in the various races by casting her electronic ballot. *See* BLACK'S LAW DICT. (10th ed. 2014) (defining "vote" as "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication"). The Election Code provides no defense to a prosecution for illegal voting if election officials discover a voter's ineligibility to vote before counting her ballot. *See* TEX. ELEC. CODE § 64.012.

The favorable evidence at trial is sufficient to allow the trial court to rationally find beyond a reasonable doubt that Appellant voted in the November 8, 2016, general election. Accordingly, Appellant's first point of error should be overruled insofar as it challenges the sufficiency of the evidence to prove that she voted.

C. The Evidence Is Sufficient to Establish Appellant's Knowledge of Her Disqualification to Vote

Appellant alleges that the State failed to prove beyond a reasonable doubt that she had "subjective knowledge" of her ineligibility to vote in the general election on November 8, 2016. Appellant's Brief at 9-14. She claims that Dietrich's and

Streibich's trial testimony was insufficient to show that she actually read the Affidavit of Provisional Voter and actually knew she was ineligible to vote. *Id*.

A person acts knowingly with respect to the nature of her conduct or to circumstances surrounding her conduct when she is aware of the nature of her conduct or that the circumstances exist or if she is aware that her conduct is reasonably certain to cause the result. TEX. PENAL CODE § 6.03(b). Direct evidence of the requisite culpable mental state is not required; it is almost always proven through circumstantial evidence. *Herrera v. State*, 526 S.W.3d 800, 809 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Knowledge may be inferred from any facts which tend to prove its existence, including the acts, words, and conduct of the accused. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (citing *Manrique v. State*, 994 S.W.2d 640, 649 (Tex.Crim.App.1999)).

Appellant knew that she was a convicted felon on supervised release when she voted on November 8, 2016. RR 2: 19-21, 108, 110, 113. Dietrich and Appellant sat at a table and actually read through each part of the provisional envelope. RR 2: 67. Dietrich gave Appellant the envelope and told her to read and fill out the section entitled "To be completed by the voter." RR 2: 67-68. Dietrich could not say with certainty that Appellant actually read it, but "she certainly paused and took some number of seconds to look over what was on the left. And she certainly read the right part, and she filled it out since she put the right information in the boxes." RR 2: 71.

Dietrich held up his right hand and asked if Appellant affirmed that all the information she provided was accurate, and she responded "in the affirmative." RR 2: 71-72. Dietrich testified he would not have let Appellant affirm to the affidavit had she appeared not to have read it. RR 2: 74, 89. He did not believe it was possible that Appellant did not review the affidavit's language; he saw her distinctly pause while reading or appearing to read the form. RR 2: 75-76, 86, 89.

Streibich sat four to five feet away from Dietrich and Appellant when they worked on Appellant's provisional ballot. RR 2: 102. He saw Appellant read the provisional ballot affidavit. RR 2: 102. He testified that he saw "[h]er finger watching each line making sure she read it all." RR 2: 102.

On cross-examination at trial, Appellant agreed that the Affidavit of Provisional Voter that she completed and executed on November 8, 2016, makes it clear that a felon who is on supervised release is not eligible to vote and that it is a second-degree felony to vote in an election in which a person knows she is not eligible. RR 2: 144-45, 150-51. She admitted that she would not have voted had she read the affidavit. RR 2: 160.

As the sole judge of Appellant's credibility and the weight to be given her testimony, the trial court was entitled to reject Appellant's testimony that she did not read the Affidavit of Provisional Voter and did not know she was ineligible to vote. *Brooks*, 323 S.W.3d at 899; *Bernal*, 483 S.W.3d at 270. Moreover, even if she failed

to read the affidavit, ignorance of the law is not a defense to prosecution. TEX. PENAL CODE § 8.03(a).

This Court should conclude that the evidence favorable to the finding of guilt allowed the trial court to rationally find beyond a reasonable doubt that Appellant voted in the November 8, 2016, general election knowing that she was ineligible to do so. Accordingly, Appellant's first point of error should be overruled insofar as she contends that she lacked the requisite knowledge to be found guilty of illegal voting.

Reply to Point of Error Three

Appellant's Contention

The illegal voting statute is unconstitutionally overbroad and void for vagueness.

State's Reply

This Court cannot consider Appellant's constitutional challenge to section 11.002(a)(4) of the Texas Election Code because it was raised in Appellant's untimely amended motion for new trial and the State objected to the trial court considering it. Alternatively, because Appellant withdrew her amended motion for new trial, Appellant never presented her complaint to the trial court, and the trial court never ruled on it; hence, nothing was preserved for review on appeal.

Arguments and Authorities

Appellant alleges that section 11.002(a)(4) of the Texas Election Code, which defines when a person is qualified to vote, is unconstitutionally vague as applied to her because neither the Texas Election Code nor the Texas Penal Code defines "supervision," making it unclear who is and is not on supervision.[7] *See* Appellant's Brief at 14-17.

[7] TEX. ELEC. CODE § 11.002(a)(4)(A) provides, in relevant part, that a person is qualified to vote if she has not been finally convicted of a felony or, if so convicted, has "fully discharged [her] sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court."

I. This Court Cannot Review Appellant's Constitutional Challenge Made in Her Untimely Amended Motion for New Trial

The right to move for a new trial in a criminal case is purely statutory. *State v. Lewis*, 151 S.W.3d 213, 217 (Tex. App.—Tyler 2004, pet. ref'd). A defendant must file a motion for new trial and any subsequent amendments within thirty days after the date when the trial court imposes or suspends sentence in open court. TEX. R. APP. P. 21.4(a), (b). The trial court is barred from considering a ground raised outside the thirty-day period if the State properly objects. *State v. Arizmendi*, 519 S.W.3d 143, 150-51 (Tex. Crim. App. 2017); *State v. Moore*, 225 S.W.3d 556, 558, 570 (Tex. Crim. App. 2007). Likewise, untimely amended motions for new trial cannot form the basis for appellate review. *Hamilton v. State*, 804 S.W.2d 171, 174 (Tex. App.—Fort Worth 1991, pet. ref'd); *see Moore*, 225 S.W.3d at 570 (if State objects to untimely amended motion for new trial, trial court and appellate court should consider only timely motion for new trial).

Appellant challenged the constitutionality of section 11.002(a)(4) for the first time in her untimely amended motion for new trial. CR 1: 65-66, 197-98. The State objected to the trial court considering any grounds that were not timely raised in Appellant's initial motion for new trial. CR 1: 98-99, 199; Suppl. RR 2: 5-8. Appellant acknowledged at the May 25, 2018, hearing that the trial court could not consider her untimely amended motion for new trial over the State's objections. CR 1: 199; Suppl. RR 2: 9-10. Under these circumstances, the trial court correctly ruled

that it was barred from considering the merits of Appellant's untimely constitutional challenge to section 11.002(a)(4)(A). CR 1: 207; *see Beathard v. State*, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989); *Perez v. State*, 261 S.W.3d 760, 771 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd); *Hamilton*, 804 S.W.2d at 174. Appellant's untimely constitutional challenge cannot form the basis for this Court's review on appeal. *Webb v. State*, 109 S.W.3d 580, 581 (Tex. App.—Fort Worth 2003, no pet.); *Hamilton*, 804 S.W.2d at 174; *see Moore*, 225 S.W.3d at 570 (if State objects to untimely amended motion for new trial, trial court and appellate court should consider only timely motion for new trial). Accordingly, Appellant's third point of error should be overruled.

II. Alternatively, Appellant Failed to Preserve Her Constitutional Challenge For Appellate Review

To preserve a complaint for appellate review, a party must first present to the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling if it is not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). An as-applied constitutional challenge is a forfeitable right that must be preserved in the trial court during or after trial. *Ibenyenwa v. State*, 367 S.W.3d 420, 422 (Tex. App.—Fort Worth 2012, pet. ref'd).

At the May 25, 2018, hearing, Appellant withdrew her untimely amended motion for new trial, and the trial court did not consider its merits. CR 1: 199-200; Suppl. RR 2: 9-10. Therefore, Appellant failed to preserve her as-applied

constitutional challenge for this Court's review on appeal because the issue was not presented to or ruled on by the trial court. *See* TEX. R. APP. P. 33.1(a)(1); *see also Mays v. State*, 318 S.W.3d 368, 388 (Tex. Crim. App. 2010); *Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995); *Ibenyenwa*, 367 S.W.3d at 422. Accordingly, Appellant's third point of error should be overruled.

Reply to Point of Error Four

Appellant's Contention

The illegal voting statute is preempted by the federal Help America Vote Act.

State's Reply

The trial court properly refused to consider arguments raised only in the *amicus* letter brief. The brief addressed no issues that the trial court had authority to consider. Moreover, the brief addressed arguments that Appellant never raised in the trial court, and no exceptional circumstances existed to consider it.

Arguments and Authorities

I. Relevant Facts

On May 23, 2018, the ACLU Foundation of Texas and the Texas Civil Rights Project filed an *amicus* letter brief in support of Appellant's untimely, and ultimately withdrawn, amended motion for new trial. CR 1: 144-57, 199; Suppl. RR 2: 9-10. The *amicus* brief asserted that the Texas Election Code conflicted with the federal Help America Vote Act (HAVA), an argument that was never raised by Appellant before, during, or after her trial. CR 1: 144-55, 199. The trial court concluded as follows in its written findings of fact and conclusions of law:

> Because the *amicus* letter brief of the ACLU Foundation of Texas and the Texas Civil Rights Project was filed in support of the Defendant's untimely-filed Amended Motion for New Trial, it addresses no issues that the Court has authority to consider. *See Arizmendi*, 519 S.W.3d at 150-51; *Moore*, 225 S.W.3d at 569-70. Alternatively, the Court will not consider the *amicus* letter brief because it addresses arguments that

> were never raised by the Defendant at trial, in the Defendant's untimely Amended Motion for New Trial, or in the Defendant's timely-filed Motion for New Trial, and no exceptional circumstances exist to consider it. *See Christopher M. v. Corpus Christi Indep. School Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) (*amicus curaie* cannot raise issue raised by neither party absent exceptional circumstances); *see Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) (appellate court could not consider arguments raised by *amicus curiae* that were not raised by parties themselves).

CR 1: 207-08.

II. The Trial Court Properly Refused to Consider Arguments Raised Only in the *Amicus* Letter Brief

Appellant asserts on appeal that section 64.012 of the Texas Election Code conflicts with HAVA, a contention that was raised only in the *amicus* letter brief filed in support of her amended motion for new trial. *See* Appellant's Brief at 17-23; CR 1: 199, 207-08. She does not address the trial court's decision not to consider the letter brief. *See* Appellant's Brief at 17-23. Nor does she offer arguments or authorities to show that the trial court erred in refusing to consider or rule on the issues raised in it. *See id*. This Court has no obligation to make Appellant's arguments for her. *Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008).

Moreover, the *amicus* letter brief was filed in support of Appellant's untimely amended motion for new trial, even though the motion did not allege a conflict between the Texas Election Code and HAVA. CR 1: 144-55, 199. Appellant agreed that the trial court could not consider her untimely amended motion for new trial

over the State's objection, and she withdrew the motion. CR 1: 199; Suppl. RR 2: 9-10. The trial court correctly ruled under the circumstances that the *amicus* letter brief addressed no issues that it had authority to consider. CR 1: 207; *see Arizmendi*, 519 S.W.3d at 150-51; *Moore*, 225 S.W.3d at 569-70.

Finally, the *amicus* letter brief addressed arguments that Appellant herself never raised in the trial court. CR 1: 199, 207. The trial court found that no exceptional circumstances existed to consider the brief, CR 1: 207-08, and Appellant makes no attempt to prove otherwise. *See* Appellant's Brief at 17-23. The trial court did not err in refusing to consider arguments set forth in the *amicus* letter brief that were never raised by Appellant. *See Christopher M.*, 933 F.2d at 1292 (*amicus curaie* cannot raise issue raised by neither party absent exceptional circumstances); *Lopez*, 22 S.W.3d at 862 (appellate court could not consider arguments raised by *amicus curaie* that were not raised by parties themselves).

Appellant's fourth point of error should be overruled.[8]

[8] Appellant's conviction for illegal voting does not run afoul of HAVA. The Act created a system for provisional balloting to alleviate problems of voters being turned away from the polls because election workers could not find their names on the list of qualified voters. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004); *see* 52 U.S.C.A. § 21082(a)(1)-(4). Appellant was provided a provisional ballot and cast her vote in the general election on November 8, 2016. Nothing in the provisional voting provisions of HAVA exempt from criminal responsibility persons such as Appellant who affirm their eligibility to vote when they know they are not eligible due to a felony conviction and continuing supervision. *See generally* 52 U.S.C.A. § 21082.

Reply to Point of Error Five

Appellant's Contention

Appellant received ineffective assistance of trial counsel.

State's Reply

This Court cannot consider Appellant's allegations of ineffective assistance made in her untimely amended motion for new trial. Furthermore, Appellant's complaints raised only in her withdrawn amended motion for new trial present nothing for this Court's review on appeal. Finally, Appellant failed to meet her burden to establish her ineffective-assistance claims raised in her timely motion for new trial.

Arguments and Authorities

I. This Court Cannot Review Appellant's Allegations of Ineffective Assistance Made in Her Untimely Amended Motion for New Trial

The right to move for a new trial in a criminal case is purely statutory. *Lewis*, 151 S.W.3d at 217. A defendant must file a motion for new trial and any subsequent amendments within thirty days after the date when the trial court imposes or suspends sentence in open court. TEX. R. APP. P. 21.4(a), (b). The trial court is barred from considering a ground raised outside the thirty-day period if the State properly objects. *Arizmendi*, 519 S.W.3d at 150-51; *Moore*, 225 S.W.3d at 558, 570. Likewise, untimely amended motions for new trial cannot form the basis for appellate review. *Hamilton*, 804 S.W.2d at 174; *see Moore*, 225 S.W.3d at 569-70

(if State objects to untimely amended motion for new trial, trial court and appellate court should consider only timely motion for new trial).

Appellant's ineffective-assistance claims on appeal include allegations that St. John failed to move to quash the indictment and failed to request a directed verdict. *See* Appellant's Brief at 24-26. These claims were raised for the first time in Appellant's untimely amended motion for new trial. CR 1: 80-81, 197-98. Appellant acknowledged that the trial court could not consider her untimely amended motion for new trial over the State's objection. CR 1: 199; Suppl. RR 2: 9-10.

Appellant also contends on appeal that St. John rendered ineffective assistance because he represented her at trial despite having an actual conflict of interest and because he failed to seek recusal of the trial judge after he disclosed that he knew Dietrich. *See* Appellant's Brief at 26-30. These allegations were made for the first time during the May 25, 2018, hearing, which was more than thirty days after the trial court imposed Appellant's sentence in open court. CR 1: 200, 208; *see* TEX. R. APP. P. 21.4(b).

The trial court correctly concluded that it was barred from considering Appellant's untimely ineffective-assistance claims over the State's objection. CR 1: 208; Suppl. RR 2: 10; *see Arizmendi*, 519 S.W.3d at 150-51; *Moore*, 225 S.W.3d at 558, 569-70. Appellant does not challenge the trial court's ruling on appeal. *See*

Appellant's Brief at 24-26. Appellant's untimely contentions of ineffective assistance form no basis for this Court's review on appeal. *Hamilton*, 804 S.W.2d at 174; *see Moore*, 225 S.W.3d at 570. Accordingly, Appellant's fifth point of error should be overruled insofar as it alleges that St. John rendered ineffective assistance by failing to move to quash the indictment, failing to request a directed verdict, representing Appellant despite having an actual conflict of interest, and failing to seek to recuse the trial judge.

II. Alternatively, Appellant's Complaints of Ineffective Assistance Raised Only in Her Withdrawn Amended Motion for New Trial Present Nothing for This Court's Review

To preserve a complaint for review, a party must first present to the trial court a timely objection stating the specific grounds for the desired ruling if it is not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). Appellant withdrew her untimely amended motion for new trial, which was the only vehicle by which she asserted her claims that St. John was ineffective for not moving to quash the indictment and requesting a directed verdict. CR 1: 80-81, 199; Suppl. RR 2: 9-10. Under the circumstances, Appellant failed to preserve these allegations for this Court's review on appeal because she did not raise them in the trial court. *See* Tex. R. App. P. 33.1(a)(1); *see also Mays*, 318 S.W.3d at 388; *Curry*, 910 S.W.2d at 496; *Ibenyenwa*, 367 S.W.3d at 442. Accordingly, Appellant's

fifth point of error should be overruled insofar as she raises these complaints on appeal.

III. Appellant Failed to Establish the Ineffective-Assistance Claims Raised in Her Timely Motion for New Trial

Appellant alleges on appeal that St. John rendered ineffective assistance of counsel at trial because he failed to explore Dietrich's bias and failed to present testimony from Appellant's mother and niece regarding Appellant's lack of knowledge and intent. *See* Appellant's Brief at 26-28. These ineffective-assistance-of-counsel claims were set forth in Appellant's timely motion for new trial. CR 1: 42-43, 197. The trial court considered and rejected each of these claims in written findings of fact and conclusions of law following the May 25, 2018, hearing on Appellant's motion for new trial. CR 1: 201-04, 208-10.

A. Standard of Review

The Sixth Amendment guarantees a criminal defendant the effective assistance of counsel. U.S. CONST. amend. VI. To establish ineffective assistance, an appellant must prove by a preponderance of the evidence that her counsel's representation was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013); *Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999). The record must affirmatively demonstrate that the claim has merit. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In evaluating counsel's effectiveness under the deficient-performance prong, courts review the totality of the representation and the particular circumstances of the case to determine whether counsel provided reasonable assistance under all the circumstances and prevailing professional norms at the time of the alleged error. *See Strickland*, 466 U.S. at 688-89; *Nava*, 415 S.W.3d at 307; *Thompson*, 9 S.W.3d at 813-14. Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct was not deficient. *Nava*, 415 S.W.3d at 307-08.

Strickland's prejudice prong requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial—that is, a trial with a reliable result. *Strickland*, 466 U.S. at 687. In other words, an appellant must show a reasonable probability that the proceeding would have turned out differently without the deficient performance. *Id.* at 694; *Nava*, 415 S.W.3d at 308. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Nava*, 415 S.W.3d at 308. The reviewing court must ultimately focus on examining the fundamental fairness of the proceeding in which the result is being challenged. *Strickland*, 466 U.S. at 696.

B. Appellant Failed to Meet Her Burden to Prove Deficient Performance or Prejudice

1. Counsel's Failure to Explore Dietrich's Alleged Bias

Appellant alleges that St. John rendered ineffective assistance of counsel at trial because he failed to explore Dietrich's bias, which she claims was evident in his failure to personally admonish her about her potential ineligibility to vote.[9] *See* Appellant's Brief at 26-27. Appellant alleges, without record citations, that Dietrich knew she previously went to prison and that, instead of raising concerns with Appellant about her potential ineligibility to vote, he waited to contact the Criminal District Attorney. *See id*.

As the trial court correctly found, the facts that Appellant asserts should have been explored with Dietrich were presented during his trial testimony. CR: 202; RR 2: 91-92, 94; Suppl. RR 2: 42-43. Dietrich testified on direct examination and cross-examination that he had no reason to suspect that Appellant was a convicted felon who was ineligible to vote. CR 1: 202; RR 2: 91-92, 94. The failure to present essentially cumulative evidence does not constitute deficient performance. *See Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007); *Barnes v. United States*,

[9] As previously discussed, Appellant's claim of bias based on the alleged grounds for recusal of the trial judge was not timely raised in Appellant's motion for new trial. CR 1: 42-45. Therefore, neither the trial court nor this Court has authority to review the allegation. *See Arizmendi*, 519 S.W.3d at 150-51; *Moore*, 225 S.W.3d at 558, 569-70.

859 F.2d 607, 608 (8th Cir. 1988) ("Direct- and cross-examination techniques are matters of trial strategy left to the discretion of counsel").

Furthermore, Appellant has not met her burden to prove that St. John's alleged deficient performance prejudiced her. Appellant did not call Dietrich to testify at the May 25, 2018, hearing, and she did not specify what questions St. John should have asked and what Dietrich's responses would have been. CR 1: 202. As the trial court found, Appellant presented no evidence that Dietrich "ever harbored any type of 'bias' toward the Defendant, much less a 'bias' that contributed to the Defendant voting illegally." CR 1: 202-03; *see* Suppl. RR 2: 4-66. Further questioning by St. John at trial would have been cumulative and would not have changed the trial court's evaluation of the evidence in finding Appellant guilty of illegal voting. CR 1: 202. No prejudice is shown where, as here, additional evidence would have been cumulative of evidence introduced at trial. *See Parker v. Allen*, 565 F.3d 1258, 1279, 1283 (11th Cir. 2009) (no prejudice where additional testimony cumulative); *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (to establish prejudice, new evidence must differ in a substantial way in strength and subject matter from evidence actually presented).

Appellant has not met her burden to prove by a preponderance of the evidence that St. John rendered ineffective assistance of counsel by failing to explore Dietrich's alleged bias in a manner that was not already explored at trial.

Accordingly, her fifth point of error should be overruled with regard to her allegation concerning Dietrich.

2. Counsel's Failure to Present Testimony from Appellant's Mother and Niece at Trial

Appellant contends that St. John rendered ineffective assistance of trial counsel because he failed to present the testimony of Appellant's mother Sherria McGraedy or her niece Joanna Jones to establish her lack of knowledge and intent. *See* Appellant's Brief at 27-28. Appellant raised her complaint in her timely filed motion for new trial, and the trial court rejected it. CR 1: 208-10.

Appellant did not call McGraedy or Jones to testify at the May 25, 2018, hearing on her motion for new trial. CR 1: 203. In preparing for trial, St. John talked to McGraedy and Appellant's daughter, who told him that Appellant believed she was eligible to vote in the November 8, 2016, general election. CR 1: 203; Suppl. RR 2: 19. St. John did not recall if he talked to Jones. CR 1: 203; Suppl. RR 2: 19. St. John did not call McGraedy or Jones to testify at trial because they were not necessary witnesses since Appellant testified that she believed she could vote and that her mother encouraged her to vote. CR 1: 203; Suppl. RR 2: 21; *see generally* RR 2: 107-61. Appellant's trial testimony was the best evidence of her alleged knowledge and intent when she signed the affidavit and cast her vote. CR 1: 203.

As the trial court found, McGraedy's and Jones' personal opinions contained in their affidavits attached to Appellant's motion for new trial reflected no basis for

personal knowledge about whether Appellant was eligible to vote or whether Appellant believed she was eligible to vote. CR 1: 203-04. Appellant testified at trial that she went to the poll with Jones, that Jones realized she was at the wrong polling location, and that Jones then "automatically went to the car"; therefore, Jones was not present when Appellant filled out and affirmed the information in the provisional affidavit and electronically cast her vote. CR 1: 204; RR 2: 118-19. McGraedy's and Jones' personal beliefs that Appellant was eligible to vote were irrelevant to whether Appellant voted illegally. CR 1: 204. The facts contained in Ms. McGraedy's and Ms. Jones' affidavits would not have changed the Court's evaluation of the evidence in finding the Defendant guilty of illegal voting. CR 1: 204.

St. John's strategic decisions regarding whether to call McGraedy and Jones to testify were matters of trial strategy. *Coble*, 496 F.3d at 436. His decision not to call unnecessary witnesses or to present cumulative testimony did not constitute deficient performance. *See id*.; *see also Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (mere fact other witnesses might have been available not sufficient ground to prove ineffective assistance). Furthermore, given the cumulative nature and lack of probative value of McGraedy's and Jones' testimony on the issue of Appellant's knowledge when she voted, Appellant has not shown a reasonable probability that she would have been acquitted had St. John called the witnesses to testify. *See Parker*, 565 F.3d at 1279, 1283 (no prejudice where additional testimony

cumulative); *Hill*, 400 F.3d at 319 (to establish prejudice, new evidence must differ in a substantial way in strength and subject matter from evidence actually presented).

Appellant has not met her burden to prove by a preponderance of the evidence that St. John rendered ineffective assistance of counsel by failing to call Appellant's mother and niece to testify about her lack of knowledge and intent when she voted in the November 8, 2016, general election. Accordingly, her fifth point of error should be overruled with regard to this allegation.

Conclusion and Prayer

Appellant suffered no reversible error. Therefore, the State prays that the trial court's judgment be affirmed.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

JOSEPH W. SPENCE
Assistant Criminal District Attorney
Chief, Post-Conviction

/s/ Helena F. Faulkner
HELENA F. FAULKNER
Assistant Criminal District Attorney
State Bar No. 06855600
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-1685
FAX (817) 884-1672
coaappellatealerts@tarrantcountytx.gov

Certificate of Compliance

The total number of words in this State's Brief, exclusive of the matters allowed to be omitted, is 8,355 words as determined by the word count feature of Microsoft Office Word 2016.

/s/ Helena F. Faulkner
HELENA F. FAULKNER

Certificate of Service

A true copy of the State's brief has been e-served on Appellant's counsel, Alison Grinter, alisongringer@gmail.com; and Kim T. Cole, kcole@kcolelaw.com, on March 28, 2019.

/s/ Helena F. Faulkner
HELENA F. FAULKNER